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## THE DRUDGE CASE: A LOOK AT ISSUES IN CYBERSPACE DEFAMATION\*

Robert M. O'Neil†

In the days following *Newsweek's* January 1998 decision to defer publication of an exposé of President Clinton's alleged affair with White House intern Monica Lewinsky, attention focused on the medium where the story first appeared: Matt Drudge's online gossip column, *The Drudge Report*.<sup>1</sup> Though his postings on this issue seem to have been substantially accurate, Mr. Drudge has recently been sued for defamation<sup>2</sup> because an earlier *Report* carried a story of a quite different sort, in which even he conceded there were some flaws.<sup>3</sup> That lawsuit provides a vehicle through which to explore a fascinating array of legal issues unique to the rapidly emerging field of online defamation. No current controversy better illustrates the novelties of free expression in cyberspace<sup>4</sup> than the *Drudge* lawsuit.<sup>5</sup>

The facts of the *Drudge* case are as follows. Late in the summer of 1997, Sidney Blumenthal was about to resume his new role as a White House Assistant.<sup>6</sup> He was startled to learn from the *Drudge Report* that he was rumored to have "a spousal abuse past that has been effectively covered up."<sup>7</sup> The source? Unnamed "GOP operatives."<sup>8</sup> When

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1. Howard Kurtz, *Clinton Scoop So Hot It Melted: Newsweek Editors Held Off in Scandal Story*, Wash. Post, Jan. 22, 1998, at C1. The *Drudge Report* is available at <<http://www.drudgereport.com/>> (visited July 19, 1998).

2. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).

3. See John Schwartz, *Journalism's Old Rule Should Apply to Cyber-Libel*, Wash. Post, Jan. 26, 1998, at F20.

4. "Cyberspace" is the general term referring to medium of communication where people and business interact by means of computer networks, electronic bulletin boards and commercial online services. See *Reno v. ACLU*, 117 S. Ct. 2329, 2334-35 (1997).

5. *Drudge*, 992 F. Supp. 44.

6. See Edward Felsenthal, *A Web of Intrigue: The Internet's Bad Boy Has His Day in Court*, Wall St. J., Mar. 11, 1998, at A1; Howard Kurtz, *Cyber-Libel and the Web Gossip-Monger: Matt Drudge's Internet Rumors Spark Suit by White House Aide*, Wash. Post, Aug. 15, 1997, at G1.

7. Kurtz, *supra* note 6, at G1.

8. Felsenthal, *supra* note 6, at A1.

challenged on the accuracy of the claim, Mr. Drudge promptly retracted and removed the offending paragraph. He publicly apologized to the Blumenthals. Mr. Drudge later admitted this was "a case of using me to broadcast dirty laundry, adding, "I think I've been had."<sup>9</sup> The implication was that one of his partisan sources had tricked him to achieve an admittedly congenial partisan goal.

The retraction and apology was not enough to satisfy the Blumenthals. They promptly filed a thirty million dollar libel suit against Mr. Drudge and America Online (AOL) in the District of Columbia court.<sup>10</sup> America Online was named as a defendant because AOL provided the principal vehicle by which readers could access *The Drudge Report*.<sup>11</sup> This novel lawsuit will compel at least one court to determine the extent to which defamation in cyberspace differs from defamation in other, more traditional media. A quick overview of the legal issues will suggest how substantially the resolution of those issues may diverge when the defamatory statements appear on the Internet rather than in print.

The *Drudge* case raises a host of intriguing and difficult questions. Since Mr. Drudge lives and writes in California, jurisdiction is a threshold issue. On what basis might the courts of the District of Columbia compel the physical presence of a purely electronic visitor? Who qualifies as an Internet "publisher" for the purposes of defamation liability? What counts as "publishing" in cyberspace? To what degree does the First Amendment privilege of fair comment on public officials and public figures<sup>12</sup> apply to online libel? What variants are required by the nature of the medium? How does the concept of retraction apply, if at all, in cyberspace? Finally, and perhaps most intriguing of the issues generated by the *Drudge* case, is a quandary posed by Mr. Drudge's own extenuations: If an online journalist publishes informally, lacking editors, lawyers and many of the other indicia of traditional print or broadcast medium, should such a journalist be held to a substantially lower standard of care?<sup>13</sup> In fairness, Mr. Drudge's plea for leniency is not unique. Far better established media, even *with* lawyers and editors, seem

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9. Kurtz, *supra* note 6, at G1.

10. See *Drudge*, 992 F. Supp. 44.

11. *Id.* at 50; see also Linton Weeks, *Clinton Aides Sue Columnist and AOL Over Abuse Allegations*, Wash. Post, Aug. 28, 1997, at D1; Linton Weeks, *The Tangled Web of Libel Law*, Wash. Post, Aug. 30, 1997, at A1.

12. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring public official to prove actual malice to recover damages in written defamation action).

13. See Schwartz, *supra* note 3.

to view cyberspace a bit differently, and less rigorously, than traditional print media.<sup>14</sup>

A prime example of publishers viewing the Internet differently from print media was the *Dallas Morning News's* web edition release of the purported but fabricated Timothy McVeigh confession.<sup>15</sup> Quite recently, the same newspaper posted on the web a story about the elusive Secret Service agent alleged to have seen Clinton and Lewinsky alone at a compromising moment.<sup>16</sup> A few days later, that lapse was followed by the *Wall Street Journal's* web edition rumor about a White House staffer's claim that he told a grand jury of a similar tryst.<sup>17</sup> A presidential spokesman remarked upon that allegation: "The normal rules of checking or getting a response to a story seem to have given way to the technology of the Internet . . . ."<sup>18</sup>

We will return later, and at greater length, to this perplexing issue of journalistic standards. First, we should probe several other novel dimensions of defamation in cyberspace. Lawsuits begin with jurisdiction, and so might we. There has been ample litigation the last three years over the power of courts to reach those whose only contact with the forum state is making possible the receipt of an electronic message in that state.<sup>19</sup> While the results are not in perfect harmony, workable standards seem to be emerging. If a non-resident defendant merely posts a Web site that may be accessed by anyone through the Internet, assertion of jurisdiction solely because one forum resident has in fact accessed that page (and may claim to have suffered some injury as a result) would not comport with well-settled standards of "minimum contacts" for traditional media.<sup>20</sup>

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14. See, e.g., Tom Kenworthy, *McVeigh Appeal Alleges Errors in Bomb Case*, Wash. Post, Jan. 17, 1998, at A8; Howard Kurtz, *Dallas Paper's Story Traveled Far Before Being Shot Down*, Wash. Post, Jan. 28, 1998, at D1.

15. See Kenworthy, *supra* note 14.

16. See Kurtz, *supra* note 14.

17. Janny Scott, *Internet Story Revives Question on Standards*, N.Y. Times, Feb. 6, 1998, at A20.

18. Howard Kurtz, *Wall Street Journal Story is Rushed Onto the Web*, Wash. Post, Feb. 5, 1998, at A12.

19. See, e.g., David L. Stott, Comment, *Personal Jurisdiction in Cyberspace: The Constitutional Boundary of Minimum Contacts Limited to a Website*, 15 J. Marshall J. Computer & Info. L. 819 (1997).

20. See, e.g., *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff'd*, 126 F.3d 25 (2d Cir. 1997) (putting up Web site in Missouri that is accessible anywhere does not support personal jurisdiction under New York long-arm statute).

If, however, an electronic communicator has done anything more substantial than creating a Web page, jurisdiction may well exist.<sup>21</sup> Sending an email message might suffice.<sup>22</sup> Creating an interactive Web page, and using that page to communicate for commercial purposes with a correspondent in the forum state, may suffice to sustain jurisdiction.<sup>23</sup> Anything more substantial will almost surely satisfy the constitutional standard of “minimum contacts,” though, of course, significant differences in the scope of state long-arm statutes will yield variations in the degree of actual judicial power over non-resident defendants.<sup>24</sup>

Mr. Drudge, who at first vigorously disputed the D.C. federal court’s assertion of jurisdiction, is arguably within the reach of that court, even though he spends most of his time in California. He gathers news in the District, and presumably exploits sources who live or work there (such as the “GOP operatives” who misled him regarding the Blumenthal’s marital condition). His presence seems to go beyond simply posting online material that may be accessed freely by D.C. residents, although the question of jurisdiction is not an easy or obvious one.

A concurrent cyber-libel case may sharply test the limits of jurisdiction over the Internet. A Northern Virginia police officer named Baitinger recently filed a defamation suit against the son of a woman he had arrested.<sup>25</sup> The son had posted a pointed and potentially defamatory account of the mother’s arrest on a Web site called *Police Brutality Page* on the Internet.<sup>26</sup> Incidentally, Officer Baitinger seemed to realize he was about to make legal history. When a reporter asked if he felt the posting had seriously damaged his reputation, he replied that he had heard from fellow officers near and far.<sup>27</sup> Then he added, in a perceptive comment, “the World Wide Web is exactly what it says—worldwide.”<sup>28</sup>

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21. See, e.g., *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417–19 (9th Cir. 1997).

22. See, e.g., *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) (making demands on plaintiff by sending electronic messages sufficient to establish personal jurisdiction).

23. *Weber v. Jolly Hotels*, 977 F. Supp. 327 (D.N.J. 1997).

24. See *Telco Communications Group v. An Apple A Day, Inc.*, 977 F. Supp. 404, 406–07 (E.D. Va. 1997) (discussing cases that address effect of Internet on redefining jurisdictional bounds).

25. See Motion for Judgment, *Baitinger v. Fajardo* (Cir. Ct. Va. 1997) (No. 160034) (on file with author).

26. *Id.* at 6; see *Police Brutality Page* (visited Dec. 30, 1996) <<http://www.aloha.net/~frzbee.pagfour.html>> (on file with author). This Web site no longer exists.

27. Mark Johnson, *Defamation Lawsuits Strike Internet*, Tampa Trib., Sept. 7, 1997, at 5.

28. *Id.*

The editor of the *Police Brutality Page*, one Alan Folmsbee, is a co-defendant in this case. Though the complaint lists him simply as “address unknown,” we do know his *virtual* whereabouts: his email address is frizbee@aloha.net and the URL for the *Police Brutality Page* was <<http://www.aloha.net/~frzbee.pagfour.html/>>. But in real space we know only that he lives somewhere in Hawaii, where he has yet to be served. One assumes he has knowledge but not notice of the case, at least in the requisite legal sense. Even if Mr. Folmsbee is eventually served, the issue of jurisdiction will be troublesome; his only contact with Virginia seems to be passively posting online accounts like the one that drew Officer Baitinger’s wrath.

Yet, Mr. Folmsbee seemed to have interacted with some of his sources. The postings were occasionally embellished with a bold-faced italic paragraph headed “Comments from the Web Page Author” wherein Mr. Folmsbee reacted to the stories he received. Thus, Mr. Folmsbee is more than simply the proprietor of a passive digital kiosk. On the other hand, he seems somewhat less active than a publisher like Matt Drudge, whose amenability to forum state jurisdiction seems more likely.

Mention of the legal status of Internet communicators as “publishers” evokes a second issue of growing importance. The earliest cases on cyber-libel addressed that issue, and yielded a pair of judgments that defined the poles of the spectrum. In 1991, a federal court held that CompuServe was not a publisher, with respect to defamatory material posted by an operationally separate and independent entity.<sup>29</sup> But in 1995, a New York state court took a quite different view of Prodigy’s liability for material that had been posted in a closely monitored chat room.<sup>30</sup> Most of the hard cases fall somewhere in between.

Congress came to the rescue before any more cases got to court. Section 230 of the Communications Decency Act of 1996<sup>31</sup> absolves Internet service providers of liability for material posted by others over whom they have no control.<sup>32</sup> We now have a definitive ruling by a federal appeals court on the scope of section 230, one that confers substantial immunity on the Internet service provider. In November 1997, the Fourth Circuit ruled in favor of America Online in a case that

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29. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

30. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 805178 (N.Y. Sup. Ct. Dec. 11, 1995).

31. 47 U.S.C.S. § 230 (Law. Co-op. Supp. 1997).

32. 47 U.S.C.S. § 230 (c).

might otherwise have imposed liability for displaying material that was not only harmful, but effectively ruined the business of a telephone marketer named Kenneth Zeran.<sup>33</sup>

While the district court based its exculpatory holding entirely on the statute,<sup>34</sup> the court of appeals went substantially further. The Fourth Circuit held that even absent such a protective statute, an Internet service provider should not, as a First Amendment matter, be liable for defamatory material posted by others and for whom the provider bore no responsibility.<sup>35</sup> We now have in the *Zeran* case a clear First Amendment precedent for the view that ISPs enjoy broad immunity for such third-party material.

The *Zeran* ruling brings us back to Matt Drudge and the Blumenthals. America Online (AOL) cited section 230 and the *Zeran* case as the basis for its dismissal from the Blumenthals' suit.<sup>36</sup> The plaintiffs' complaint, however, sought to circumvent that shield by invoking the complex and mutually beneficial relationship between author/publisher and provider.<sup>37</sup> When AOL expanded its online resources last summer, it touted in a press release the hiring of "Runaway Gossip Success Matt Drudge."<sup>38</sup> The nexus here is arguably much closer than those to which section 230 and the *Zeran* case apply.

On April 22, 1998, however, the district court ruled, albeit reluctantly, that America Online was as free of civil liability in the Blumenthal case as it had been in *Zeran*.<sup>39</sup> The court found in section 230 a clear congressional intent to exempt Internet service providers—"[w]hether wisely or not"—from a broad range of potential tort claims.<sup>40</sup> That conclusion followed despite a degree of editorial control that seemed to the court to make it "only fair" to allow defamed persons to proceed

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33. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, No. 97-1488, 1998 WL 111522 (June 22, 1998).

34. *Zeran v. America Online, Inc.*, 958 F. Supp. 1124 (E.D. Va. 1997).

35. *Zeran*, 129 F.3d at 333.

36. *Blumenthal v. Drudge*, 992 F. Supp. 44, 49-51 (D.D.C. 1998).

37. *Id.* at 51-53.

38. *AOL News* (visited July 15, 1997) <<http://www.db.aol.com/corp/news.press/view?release=201>> (on file with author).

39. *Drudge*, 992 F. Supp. 44; *see also* Bill Miller, *AOL Off the Hook in Drudge Case*, Wash. Post, Apr. 23, 1998, at B1; David Stout, *America Online Libel Suit Dismissed*, N.Y. Times, Apr. 23, 1998, at A21.

40. *Drudge*, 992 F. Supp. at 49.

against the provider.<sup>41</sup> The plaintiffs immediately declared their intent to appeal.<sup>42</sup> The reviewing court will tell us much about the potential liability of ISPs beyond passive access.

Too much passivity could still create liability. There could be situations in which a provider or network left in place damaging material, of which it was aware through notice or complaint, for so long a time as to imply its endorsement or at least acquiescence. One recalls that the *Dallas Morning News* left the purported McVeigh confession on its web edition several weeks after it had been wholly discredited.<sup>43</sup> There is one print case that seems closely on point. An industrial employer was found liable to a worker for failing to remove offensive and damaging graffiti from a plant bulletin board long after the victim had complained.<sup>44</sup> Such a rule presumably applies in cyberspace, notwithstanding section 230 and the *Zeran* case. If a provider has both the technical and legal capacity to remove offending material, but fails to do so for an unconscionably long time after being notified, then liability might follow without impairing free speech.

Discussing a publisher's potential liability raises questions about the concept of publication. It is black-letter law that words are not defamatory unless they have been published.<sup>45</sup> If A insults B face-to-face with a false charge, but no one else overhears it, A may have offended, but has not defamed. The same is true of false accusations in a sealed envelope, or of the typical two-way phone call.

What should the rule be for person-to-person email? It would be quite naive to assume such messages (unless encrypted) are truly confidential. At the very least, email is likely to be backed up and stored in a central computer. Often, purportedly personal messages may be intercepted in less benign ways. The risk of a third party accessing almost any email message seems so high that I would propose a simple, if novel, rule: publication should be presumed in an online libel suit. The defendant might rebut the presumption and prove the contrary, for example, with evidence that the message was encoded in a highly secure fashion that would make interception highly improbable.

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41. *Id.* at 51–52.

42. Miller, *supra* note 39, at B1.

43. See Kenworthy, *supra* note 14, at A8.

44. Tackett v. General Motors Corp., 836 F.2d 1042 (7th Cir. 1987).

45. Lawrence H. Eldredge, *The Law of Defamation* § 35, at 205 (1978).



We might add one other publication issue before moving on—an issue actually raised in a recent unreported case. Suppose a libelous story initially appears online—say in a newspaper or magazine’s web edition—and the next day first appears in print. And suppose (this was a real case) a lawsuit is filed two years to the day from the print publication. Is that suit time-barred where the limitations period is two years? It seems obvious that the claim should be dismissed on that basis. The cause of action runs from the moment of *publication*, and not from the first appearance of the libel *in print*.<sup>46</sup> There might be narrow exceptions, for example, where the electronic text was encrypted on its way to the printer, or where access to the digital version was limited to a group among whom the communication would have been privileged even in print. Otherwise, we should accept the idea that publication is publication, regardless of format, and that the clock runs from first posting in any medium.

We move now to some very basic issues arising under the *Sullivan* privilege of fair comment.<sup>47</sup> This defense has always been viewed as a “media” privilege. Justice Brennan, in his eloquent opinion, spoke of the need for “breathing space” so the press could effectively pursue its task as a watch dog of government.<sup>48</sup> Thus one might wonder whether people like Matt Drudge may even claim the privilege.

The issue is not an easy one. The U.S. Supreme Court has addressed the nonmedia defendant question only once.<sup>49</sup> In the mid-1980s, the Vermont Supreme Court declined to follow a lower state court which had specifically denied the *Sullivan* privilege to a credit-rating agency because it was not “media.”<sup>50</sup> The U.S. Supreme Court affirmed, but on a different ground, and failed to address the issue of the privilege of fair comment to media defendants.<sup>51</sup> If *Dun & Bradstreet*, the publisher of the

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46. See, e.g., *Mikaelian v. Drug Abuse Unit*, 501 A.2d 721 (R.I. 1985) (barring defamation action because statute of limitation began to run when defamatory letter was published, not when plaintiff discovered existence of defamatory writing); see also Eldredge, *supra* note 45, § 13, at 36 (advocating non-distinction on forms of defamation and stating “it is not the form of publication which is important but the factors . . . in *Restatement, Torts*, Section 568 (3)”).

47. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

48. *Id.* at 272 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

49. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

50. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417–18 (Vt. 1983), *aff’d*, 472 U.S. 749 (1985) (ruling that credit agencies are not type of media worthy of First Amendment protection as contemplated by *Sullivan*).

51. *Dun & Bradstreet*, 472 U.S. 749.

credit rating, can claim the privilege, why not Matt Drudge? This issue should now be addressed much more directly than it has been to date.

A central rationale for the *Sullivan* privilege may not, however, translate in cyberspace. One premise for the “fair comment” privilege has always been the unusual capacity of a public official (later a public figure as well) to respond to charges that falsely damaged his or her reputation.<sup>52</sup> In short, if a public official calls a press conference, they will come. Justice Powell expanded on this point, noting that public officials and public figures have uncommon recourse to self-help, specifically because they have “significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals.”<sup>53</sup> This factor, along with the Harry Truman maxim, “if you don’t like the heat, stay out of the kitchen,” has undergirded the fair comment privilege from its inception.

Given this rationale, one commentator has argued that everyone in cyberspace should be treated as a public figure.<sup>54</sup> The Internet has been characterized as a “textbook marketplace for the trade of ideas,”<sup>55</sup> a view that gains reputable support from Justice Stevens’s opinion striking down the “indecentcy” ban.<sup>56</sup> Thus, it is pointed out that while one can be libelled on the Internet before a large segment of the population, it is also possible for the victim to post a “nearly universal and instantaneous response.”<sup>57</sup>

That responsive capacity, so the argument goes, enables the victim of online defamation to issue an immediate reply in a chat room or newsgroup, and thus reach at once the very audience that saw the initial libel.<sup>58</sup> It is therefore suggested that everyone who claims to be defamed in cyberspace should be treated as a public figure.<sup>59</sup> Every libel plaintiff

52. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

53. *Id.*

54. Jeremy Stone Weber, Note, *Defining Cyberlibel: A First Amendment Limit for Libel Suits Against Individuals Arising from Computer Bulletin Board Speech*, 46 Case W. Res. L. Rev. 235, 261 (1995).

55. *Id.* at 263.

56. *See Reno v. ACLU*, 117 S. Ct. 2329 (1997) (holding unconstitutional provisions of Communications Decency Act of 1996 prohibiting transmission of obscene communication on Internet).

57. Weber, *supra* note 54, at 268.

58. *Id.* at 269.

59. *Id.* at 261.

would then have to meet the “actual malice” standard—a very high threshold that few public persons claiming to be defamed in print ever succeed in meeting.<sup>60</sup>

The argument is beguiling, but seems seriously flawed. For starters, it gives exaggerated importance in the constitutional equation to the “call a press conference and they will come” factor. At least as central to the fair comment privilege are such other factors as the “stay out of the kitchen if you don’t like the heat” maxim, and the Court’s consistent emphasis on freedom of expression’s need for “breathing space . . . to survive” in a robust debate.<sup>61</sup> Moreover, as a practical matter, the above argument makes highly questionable assumptions about the capacity of a defamed person to reply in cyberspace.

Take the *Drudge* case, for example.<sup>62</sup> While the husband is undoubtedly a public official or a public figure, the wife’s situation is far less clear. Although she is on the federal payroll, hers is hardly a household name. Now, suppose they were genuinely private figures. Though the Blumenthals did persuade Mr. Drudge to retract his accusation, the damage had already been done in ways the subjects could not easily refute or redress. Beyond the immediate publication, which one could conceivably correct by posting online protests, collateral damage would likely result from republication in other media, including newspapers and magazines that one could not easily allay through the Internet.

Even if the Blumenthals had created their own Web page, the concordance between their readership and that of the *Drudge Report* would likely be minimal, far lower than the typical overlap between even politically disparate print media. If a libel victim does not have a personal Web page, but finds in the false charges an impetus to create one, the damaging statement would have already wounded deeply by the time the truth could be posted. This leaves aside the question of who, among the audience for the libel, would seek out that newly created page among the hundreds that go online every day. If the defamatory message first appeared in an interactive format, which the *Drudge Report* does not offer, there may be slightly greater hope of reply.<sup>63</sup> Yet, the task of

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60. *Id.*

61. *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

62. See *supra* notes 2–9 and accompanying text.

63. A Web site is “interactive” if it allows its users to trade information with the host computer. See *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997).

getting there in time, and reaching the audience that had viewed the offending message, would still be daunting.

There may be situations to which the “responsive capacity” argument applies more comfortably. Recall the case mentioned earlier of the Virginia police officer and the posting on the *Police Brutality Page*.<sup>64</sup> His status as public official and public figure for purposes of the fair comment privilege is unclear; courts have split on how to treat defamation plaintiffs very much like him.<sup>65</sup> Thus, his capacity to reply—if it were substantially greater online than in print—could tip the balance against him on this threshold issue. Though the author/editor maintains some control over what gets posted, and while the *Page* at its last appearance contained no messages sympathetic to law enforcement, an externally-posted response to a damaging accusation already on the *Page* might survive and attract some attention. At least that potential channel of recourse might incline a court to resolve doubts online in favor of public figure status in what would, in print, be a close case.

There are several other respects in which the difference among print and cyberspace media may have legal import. Where the digital format of the initial message creates a readier right of reply, that fact might bear upon the measure of damages. If a person whose reputation has been harmed online fails to pursue responsive channels that a reasonable person would have pursued in mitigation, a court might take that fact into account in measuring damages. Such recourse might also bear upon the appropriateness and timing of a retraction in states where retraction serves to mitigate a libeler’s liability. Thus, the “every plaintiff a public figure” notion, while by no means universally applicable to digital defamation, may have some use in cases where an expanded ability to respond does exist.

It might be useful to take stock before moving to the final issue of standards and responsibility. Issues of jurisdiction have been extensively addressed by the courts, and a rule seems to be emerging: anything more than a passive posting accessible in the forum state confers jurisdiction. Internet service providers can no longer be held liable as publishers for

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64. See *supra* notes 25–28 and accompanying text.

65. Compare, e.g., *Britton v. Koep*, 470 N.W.2d 518 (Minn. 1991) (ruling that county probation officer qualifies as public officer and is required to show actual malice to prevail in defamation suit), with *Ellerbee v. Mills*, 422 S.E.2d 539 (Ga. 1992) (holding that principal in public high school is not public official and therefore not required to establish malice to recover in defamation action).

material posted by others.<sup>66</sup> However, a host of electronic speakers with greater control over content are in a different situation; their potential liability will continue to be assessed under rules carried over from print. As for public officials and public figures under the *Sullivan* privilege of fair comment, it seems unlikely that electronic bulletin boards and Web pages would be excluded from the privilege's protection because they are not traditional media. Finally, it would be unsound to treat every online libel plaintiff as a public figure just because there are more opportunities to reply online. However, in situations where electronic rebuttal is genuinely easier and faster, that factor might help in resolving close cases.

What about Matt Drudge's claim that he should not be held to quite so rigorous a standard of care as his more established print counterparts?<sup>67</sup> The argument has at least a superficial appeal. The U.S. Supreme Court, in the "indecency" case last summer, waxed eloquent about this exciting and bold new medium of communication—"a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers."<sup>68</sup> Justice Stevens added that "[a]ny person or organization with a computer connected to the Internet can 'publish' information."<sup>69</sup> Thus, Mr. Drudge might invoke the highest legal authority in the land in support of his plea for leniency.

In this respect he seems to have reputable company. Earlier we noted two recent occasions when the *Dallas Morning News* web edition posted conjectures that had not been subjected to the scrutiny that should have precluded publication in print.<sup>70</sup> Then there was the *Wall Street Journal's* comparable lapse, in its web edition, with regard to a rumored Clinton-Lewinsky sighting.<sup>71</sup> Apparently, the editors of these web editions enjoy substantial autonomy not only from the print newsroom, but from the front office as well. We have yet to find in court any suit against a regular print medium for material that appeared only in digital format, but such cases cannot be far in the future.

Matt Drudge is not the first online publisher to face a libel suit. Several years ago, Brook Meeks settled a similar claim after protracted

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66. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

67. See Schwartz, *supra* note 3, at F20.

68. *Reno v. ACLU*, 117 S. Ct. 2329, 2335 (1997).

69. *Id.*

70. See *supra* notes 15–18 and accompanying text.

71. See Scott, *supra* note 17, at A20.

negotiations.<sup>72</sup> Although Mr. Meeks is a highly esteemed and acclaimed journalist who sought no special dispensation, the medium was a new online journal like the *Drudge Report*. Had it not been settled, the *Meeks* case might have given the courts the first opportunity to visit the issue of basic legal standards for online defamation. The *Drudge* case almost certainly provides the vehicle for doing so. Since Mr. Blumenthal is actually a far more seasoned journalist than Mr. Drudge, neither party seems likely to quit the battlefield early.

The case for a lower legal standard for online publishers surely cannot turn on Mr. Drudge's own rather casual characterization of his craft: the fact that, as a one-person editor/publisher, he does not enjoy the benefit of a battery of lawyers, editors, or executives to guide or supervise him in what should and should not be published on his Web site. Such a claim has never availed a print publisher who is small, new, or avant garde, and lacks the safeguards that metropolitan dailies and weekly news magazines and major broadcasters have at their disposal.

That view is surely the conventional wisdom. It has been so often reiterated lately that Mr. Drudge must begin to feel something of a journalistic leper.<sup>73</sup> As *Washington Post* Internet expert John Schwartz wrote of the *Drudge* case a couple of weeks ago: "The First Amendment is the First Amendment here and in cyberspace. . . . The case will turn on the same issues that any newspaper or television libel case would."<sup>74</sup> Schwartz observed: "Today's Internet journalists . . . are at about the stage of the pamphleteers of the 18th century, inveighing against Thomas Jefferson and the truth be damned. Their right to speak had to be protected, but the right of others not to be damaged had to be protected as well."<sup>75</sup>

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72. Brook Meeks is an on-line journalist who posted on his Web page that a corporate entity, Suarez Corporate Industries, is a scam. See Marie D'Amico, *Steer Clear of Legal Potholes: Avoiding Legal Liability on the Web*, Digital Media, May 31, 1996, at 12. Mr. Suarez sued for defamation and Mr. Meeks settled out of court. *Id.*

73. See, e.g., Felsenthal, *supra* note 6, at A1.

74. Schwartz, *supra* note 3, at F20. An early ruling by the district court suggests that Mr. Drudge may enjoy even *less* protection than do regular print journalists. While dismissing America Online as a defendant in the *Drudge* suit, the court characterized Drudge as "simply a purveyor of gossip" who may not even be able to invoke the *Sullivan* privilege in a libel suit brought by a public official and public figure. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998). Mr. Drudge, when informed by a reporter of the ruling, responded, "I'm not a journalist. I'm a kangaroo! I'll see Mr. Blumenthal in court,"—an implication that he may no longer contest the court's jurisdiction. David Stout, *America Online Libel Suit Dismissed*, N.Y. Times, Apr. 23, 1998, at A21.

75. Schwartz, *supra* note 3, at F20.

Nonetheless, so confident an assertion of the conventional wisdom—to which I must confess I fully subscribe—may do a subtle injustice to the Matt Drudges, the Brook Meekses, and the Alan Folmsbees. They are, after all, the Thomas Paines of the 1990s.<sup>76</sup> Recall what happened just two years ago when the first reporter for an online journal sought a pass to enter the U.S. House and Senate press galleries.<sup>77</sup> Because he did not write for a traditional, established newspaper on which you could soil your fingers, or report for a radio or television station you could receive over the air or on cable, he was initially barred by the judgment of the regular press corps.<sup>78</sup> They soon came to their senses, reversed this unconscionable slight, and welcomed to the gallery their first online colleague.<sup>79</sup> Since then, other representatives of the digital media have been accredited. Matt Drudge has now been anointed as a media questioner on “Meet the Press.”<sup>80</sup>

As we have acquired a better understanding of the wonders of cyberspace, perspectives have changed rapidly. One may confidently argue, as I would, that Matt Drudge is wrong when he pleads for a lesser standard of care in libel cases. In so doing, let us not commit the error of the gatekeepers at the Capitol who initially denied a press pass to the first online journalist. They might have done the same to Thomas Paine, and would later have confessed their error with comparable chagrin. We ought to be able to maintain print-media standards within the First Amendment, while at the same time welcoming—indeed embracing—the special qualities and the marvelous potential of new and wondrous communications technologies.

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76. Mark Fitzgerald, *Defending Web Journalism*, Editor & Publisher, Feb. 14, 1998, at 50 (quoting Merrill Brown, editor-in-chief of MSNBC, interactive joint venture newspaper between NBC and Microsoft) (“We [interactive newspapers] must not let the behemoths of the news media judge us by the gadflies of the Internet. We are not Matt Drudge any more than Liz Smith is the mainstream media.”). Matt Drudge is no longer a uniquely American institution. He appears to have a Canadian counterpart, Pierre Bourque, who posts political rumors and gossip from Parliament Hill on his Web site, the *Bourque Watch* at <<http://www.bourque.org>>. See Tanya Davies, *Cyber Scoops*, MacLean’s, Apr. 13, 1998, at 12, 12.

77. See Graeme Browning, *No Pass for Net Publisher*, Nat’l J., Apr. 6, 1996, at 777, 777.

78. *Id.*

79. Lindsay Sobel, *Slate Gets Credentials Despite Lawsuit*, The Hill, Apr. 23, 1997, at 7, 7.

80. See Felsenthal, *supra* note 6, at A1.